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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PAUL ALEXANDER, Defendant and Appellant.	G040766 (Super. Ct. No. 06WF1491) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Michael Paul Alexander appeals his sentence on his conviction on one count of transportation of a controlled substance (cocaine) in violation of Health and Safety Code section 11352. He argues that his acquittal on a charge of possession of cocaine for sale (Health & Saf. Code, § 11351) obliged the trial court under Proposition 36 to find him eligible for drug treatment and probation (Pen. Code, § 1210 et seq.). We find no error and affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

On May 30, 2006, around 2:30 a.m., Huntington Police Officer Brian Jones saw a speeding car heading south on Beach Boulevard as it swerved and straddled the lane dividers. He initiated a traffic stop.

Defendant, the driver, had borrowed the car about three weeks earlier. He had not slept for nearly 24 hours. He concedes in his brief that his movements and appearance showed he "was obviously under the influence of [a] stimulant such as cocaine."

Defendant consented to a search of the car. During the search, defendant's cell phone rang about 15 to 20 times. Jones searched the rear compartment of the car and found a large black suitcase containing a black plastic knotted grocery bag on top of defendant's clothing. Inside the grocery bag, Jones found a gray digital scale, and a clear plastic sandwich bag with what was later determined to be nearly an ounce of powder cocaine.

Defendant was prosecuted for possession for sale of cocaine (count 1), transportation of cocaine (count 2), and misdemeanor possession of marijuana (count 3).

Defendant, testifying in his own defense, admitted that he owned the suitcase, but denied he put cocaine there. He claimed to have "no idea" how the digital scale came to be in the car, and surmised that the cocaine had been placed there by his passenger.

Jones testified that defendant possessed much more cocaine than typical users, and that scales commonly were used for cocaine sales. "In my experience as a police officer throughout the ten years, when I find people that are just in possession for . . . personal use, I've never seen anyone with an ounce. It's always a teener . . . ."[1] Defendant disagreed with the officer about the significance of the amount, explaining: "Depends upon who you're partying with." Defendant also testified that heavy cocaine addicts also could use scales "so they get a better discount, they buy and they don't want to get . . . ripped off."

After a three-day trial, the jury found defendant not guilty of possession for sale, but guilty of the lesser included offense of simple possession. (Health & Saf. Code, § 11350.) On count 2 (transportation of cocaine) and count 3 (misdemeanor possession of marijuana), the jury found defendant guilty as charged.

Several weeks later, the trial court held a Proposition 36 eligibility hearing. The court found defendant had not met his burden to show that his transportation was for "personal use" under Penal Code section 1210. The court stated: "All right. I'm going to exercise my discretion and find based on the quantity, based on the scales — I don't think the phone, but the phone is another indication — and the quantity is just too great, I'm going to find the transportation was for sale." The court ordered defendant to serve 365 days in county jail and placed him on three years of formal probation.

II

DISCUSSION

Substantial Evidence Supports the Trial Court's Determination on "Personal Use" for Purposes of Proposition 36 Sentencing

Proposition 36, the "Substance Abuse and Crime Prevention Act of 2000," is intended to divert nonviolent drug offenders convicted of simple drug possession and

[1] A "teener" is 1/16 of an ounce of cocaine.

drug use from incarceration into community-based substance abuse programs. (See *People v. Canty* (2004) 32 Cal.4th 1266, 1280-1281.)

Proposition 36 does not automatically apply to all defendants convicted of simple drug offenses. Instead, Proposition 36 establishes an eligibility requirement by defining the term "nonviolent drug possession offense" as "the unlawful *personal use*, possession *for personal use*, or transportation *for personal use* of any controlled substance identified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code." (Pen. Code, § 1210, subd. (a), italics added.) Here, the jury convicted defendant of transporting cocaine, but made no finding whether this transportation was "for personal use," since that was not an element of the crime. (See *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1115 (*Glasper*).)

Consequently, defendant's conviction under Health and Safety Code section 11352 did not automatically determine his eligibility under Proposition 36. To obtain the benefits of Proposition 36, a defendant "has the burden of proving that the possession or transportation was for personal use." (*People v. Dove* (2004) 124 Cal.App.4th 1, 10 (*Dove*).) This determination is made by a trial judge, not a jury. (*People v. Varnell* (2003) 30 Cal.4th 1132, 1141-1144 (*Varnell*).)

Proposition 36 is silent on the issue of burden of proof. In the absence of any express statutory guidance, courts have held that the burden of proof falls upon defendants, who effectively seek to be relieved from serving the sentence they otherwise would have received for a drug conviction. "[W]e are convinced the intent of the electorate to strictly limit the use of Proposition 36 to those involved in simple drug possession *for personal use* would be frustrated were we to accept the argument that a defendant must be given Proposition 36 diversion unless the prosecution pleads and the

jury finds that the felony of transportation was for something other than personal use." (*Glasper, supra,* 113 Cal.App.4th at p. 1114, italics added.)

Because Proposition 36 *reduces* rather than *increases* criminal penalties, federal constitutional law does not require this factual issue to be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 206; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [due process clause permits sentencing findings to be proven by preponderance of the evidence rather than beyond a reasonable doubt where such findings do not result in a penalty beyond the statutory maximum]; see discussion in *Varnell, supra,* 30 Cal.4th at p. 1142; see also *Dove, supra,* 124 Cal.App.4th at pp. 7-11.)

Defendant does not challenge these principles. As defendant aptly observes, "[b]ecause there is no such crime as 'transportation of a controlled substance for sale,' when a transportation conviction is involved, *it necessarily falls to the trial court* to determine whether the defendant was transporting the controlled substance for personal use or for commercial use." (Italics added.) Although defendant acknowledges the trial court must make the eligibility determination, he contends the trial court was duty-bound to follow the jury verdict that he did not possess cocaine for sale. According to defendant, any finding that he did not possess cocaine for sale compels a finding that he must have possessed (and transported it) for his personal use.

Dove and *Glasper* have discussed and rejected this precise claim. As the *Dove* court stated: "[*T*]*he acquittal on the charge of possession for sale did not bind the trial court.* The acquittal simply meant the jury was not convinced beyond a reasonable doubt that the possession was for sale. . . . [*T*]*he trial court was free to redetermine the personal use issue based on the preponderance of the evidence.* [Citations.]" (*Dove, supra,* 124 Cal.App.4th at p. 11, italics added; see also *Glasper, supra,* 113 Cal.App.4th at pp. 1107-1108.)

Defendant alternatively argues that there is "abundant" evidence that he possessed and transported the cocaine for personal use, not for sale. He stresses his lack of cash and sales paraphernalia, such as pay-owe sheets, when apprehended. He claims it was not unusual to receive many cell phone calls when "he was clearly part of a busy and popular drug scene, with plenty of friends who enjoyed partaking of controlled substances." And according to defendant, he carried the scales "to protect . . . against cheats."

Essentially, defendant asks us to reweigh the evidence and disagree with the trial judge. This we cannot do. Substantial evidence, including the quantity of cocaine, the scale and, to a lesser extent, the ringing cell phone in the early hours of the morning, supports the trial court's finding that defendant transported the marijuana for sale, and not for personal use. Because defendant had the burden of proof on this issue, the trial court did not err in sentencing him to jail time and formal probation rather than to Proposition 36 diversion.

III

DISPOSITION

The judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.